

CHIEF COUNSEL MEMORANDUM

SUBJECT: Policies and Procedures Concerning the Corps of Engineers' Trial Attorney Qualification Program

1. Introduction. This memorandum sets forth the policies and procedures for the Corps of Engineers' Trial Attorney Qualification Program (TAQ Program), which was established pursuant to the Memorandum for Record dated 22 January 1997, subject: Chief Counsel's Task Force on the Delivery of Legal Services; Recommendation #6, Modify Chief Trial Attorney Function; Establishment of a Trial Attorney Qualification Program- DECISION. The TAQ Program requires that trial attorneys be designated as qualified in order to represent the Corps of Engineers as lead counsel in Type II and III contract appeals before the Engineer Board of Contract Appeals (Engineer Board) and the Armed Services Board of Contract Appeals (ASBCA). Heads of legal offices may assign trial attorneys to specific Engineer Board and ASBCA appeals. However, only trial attorneys designated as qualified may represent the Corps as lead counsel in Type II and III cases at the Engineer Board and ASBCA.¹ These policies and procedures are also available on the Corps of Engineers Legal Services Home Page; the Internet address is www.usace.army.mil/cecc/maincc.htm.

2. Effective Date. The effective date for the TAQ Program is 1 July 1997. For all Type II and III contract appeals filed at the ASBCA or Engineer Board on or after 1 July 1997, the trial attorney assigned to represent the Corps as lead counsel must be designated as qualified. Trial attorneys should request to be designated as qualified during the transition period before the effective date of the TAQ Program.

3. Classification of Cases. As an initial matter, the head of the legal office where the contract appeal originates is responsible for the proper classification of the contract appeal as Type I, II, or III. The OPM standards, as augmented by the USACE Supplementary Classification Guide for Attorneys in Offices of Counsel, dated 9 May 1989, will be used in making this determination.

4. Assignment of Cases. When an appeal has been classified as Type I, II, or III, the head of the legal office will assign a trial attorney to the appeal. For Type I cases, the head of the legal office has complete discretion to assign any attorney as lead counsel; there are no mandatory qualification requirements. For Type II and III cases, the trial attorney assigned as lead counsel

¹However, a trial attorney does not have to be designated as "qualified" in order to represent the Corps as the other co-counsel or second chair in a Type II or III appeal. The terms lead counsel, co-counsel and second chair are defined in footnotes 2, 3 and 4, *infra*.

must be designated as qualified to handle the appeal. If an office does not have the capability to handle a Type II or III case, the following guidelines will apply. If a District does not have the capability to handle Type I or II cases, the District Counsel shall obtain trial attorney services from another District within the Division and inform the Division Counsel. For Districts without a Type III “qualified” trial attorney or when additional capability is needed, the District Counsel with the prior approval of the Division Counsel will obtain such “qualified” trial attorney services from another District within the Division. When a Division does not have the needed trial attorney capability, the Division Counsel will obtain appropriate trial attorneys from elsewhere in the Corps legal services system. Counsel for Centers, Laboratories, and FOAs without trial attorney capability shall obtain necessary trial attorney services from another counsel office. For Type III cases, Counsel for Centers, Laboratories, and FOAs will also secure the prior approval of the Chief Trial Attorney.

5. Qualification Criteria. In order to be designated as qualified, a trial attorney must meet the following qualification criteria:

A. Type II Cases.

(1). Experience. The attorney must satisfy one of these experience requirements.

(a). Lead counsel² in two Type I Board of Contract Appeals (BCA) appeals (including bid protests before the General Services Board of Contract Appeals), or as co-counsel³ or second chair⁴ in one Type II or III BCA appeal; OR

(b). Lead counsel, co-counsel, or second chair in five BCA appeals or non-BCA trials; OR

(c). Two years of substantial experience in the administration of Federal contracts, such as reviewing Contract Disputes Act (CDA) claims and preparing Contracting Officer’s Final Decisions, plus some experience in

²The term “lead counsel” is defined as the trial attorney who is assigned the primary responsibility for developing and managing all aspects of the litigation and who signs all trial documents.

³The term “co-counsel” is defined as an attorney who takes a major, but shared, role in developing and managing the litigation of a case, conducting discovery, developing trial strategy, conducting witness examination, and briefing.

⁴The term “second chair” is defined as an attorney who assists the attorney(s) of record in the formation, management, and administration of a case, but was not responsible for a significant portion of the trial presentation.

preparing cases for trial or litigating cases before Federal, state, or military courts or administrative tribunals.

(2). Training. The attorney seeking qualification must have taken at least one of the following training courses, and must agree to apply for the other courses within two years. The head of the legal office must commit to sending the attorney to the other courses within two years.

- (a). The PROSPECT Corps Trial Attorney Course or an equivalent;
- (b). The PROSPECT Contract Law Course, JAG School Contract Attorney's Course, or an equivalent;
- (c). ADR Training.

B. Type III Cases.

(1). Experience. The attorney must satisfy one of these experience requirements.

- (a). Lead counsel in any combination of five cases: BCA appeals, third-party assisted ADRs based on a CDA claim, or cases before the Court of Federal Claims involving CDA litigation; OR
- (b). Lead counsel in one BCA appeal and lead counsel or co-counsel in nine other trials or third-party assisted ADRs; OR
- (c). Co-counsel in two Type III BCA appeals, where the attorney had significant responsibilities in the trials, and lead counsel or co-counsel in nine other trials or third-party assisted ADRs.

(2). Training. The attorney must have completed all of the training courses listed in paragraph 5 (A) (2), above.

(3). Special Skills. The trial attorney must demonstrate excellent written and oral communication skills, current knowledge of contract law and issues, and the ability to manage extremely complex litigation.

6. Procedures. To assist in the qualification process, sample requests and designations are enclosed.

A. Type II Cases.

(1). The head of the legal office will designate in writing trial attorneys as qualified for Type II cases. To request designation as a qualified Type II trial attorney, a written qualifications statement will be submitted by the trial attorney to the head of the legal office.⁵ The statement must include the following information: (1) a summary of the trial attorney's contract law experience or a list of cases sufficient to meet the minimum qualification requirements, including the following elements: case name, Type I, II, or III, forum, the trial attorney's role in the case, and whether there was a trial, hearing, or third party assisted ADR in the case; and (2) a list of required training courses the trial attorney has completed. The trial attorney must agree to apply within two years of submitting the request for the required courses that have not been completed. The trial attorney should provide sufficient information to demonstrate that the minimum experience and training requirements have been satisfied; however it is not necessary to list every case tried or course taken. A sample request is at Enclosure 1.

(2). The head of the legal office will review the qualification request, and, upon determining that the trial attorney meets the qualification criteria, will designate the trial attorney as qualified for Type II cases. The head of the legal office will prepare a written notice of the designation. A sample notice is at Enclosure 2.

(3). A copy of the designation will be forwarded to the Chief Trial Attorney. The transmittal to the Chief Trial Attorney will include, if applicable, a commitment to sending the trial attorney to any required courses that have not been completed within two years of the designation. A sample notice of designation is at Enclosure 3.

(4). The Chief Trial Attorney will maintain a list of trial attorneys designated as qualified for Type II cases.

B. Type III Cases.

(1). The Chief Trial Attorney will designate trial attorneys as qualified for Type III cases. To request designation as a qualified Type III trial attorney, a written qualifications statement will be submitted by the trial attorney to the head of the

⁵If the trial attorney seeking Type II qualification is a District Counsel, the request for qualification designation will be submitted to the Division Counsel. If the trial attorney seeking Type II qualification cases is a Division Counsel, Center Counsel, Laboratory Counsel, or FOA Counsel, the request will be submitted to the Chief Trial Attorney for qualification designation.

legal office.⁶ The statement must include the following information: (1) a summary of the trial attorney's contract law experience or a list of cases sufficient to meet the minimum qualification requirements, including the following elements: case name, Type I, II, or III, forum, the trial attorney's role in the case, and whether there was a trial, hearing, or third party assisted ADR in the case; (2) a list of required training courses the trial attorney has completed; and (3) a description of the trial attorney's written and oral communications skills, current knowledge of contract law and issues, and ability to manage extremely complex litigation. The trial attorney should provide sufficient information to demonstrate the required special skills and to show that the minimum experience and training requirements have been satisfied; however it is not necessary to list every case tried or course taken. A sample request is at Enclosure 4.

(2). The head of the legal office will review the qualification request. If the head of the legal office concurs that the trial attorney meets the qualification criteria, the request will be forwarded through command channels to the Chief Trial Attorney for decision. The request will include the head of the legal office's assessment of the trial attorney's experience, training, and special skills. A sample transmittal memorandum is at Enclosure 5.

(3). The Chief Trial Attorney will review Type III requests. If the Chief Trial Attorney determines that the trial attorney meets the qualification criteria, the Chief Trial Attorney will designate the trial attorney as qualified for Type III cases. The Chief Trial Attorney will then forward a certificate designating the trial attorney as a "Qualified Type III Trial Attorney."

(4). When the Chief Trial Attorney does not believe the trial attorney meets the qualification criteria, the Type III designation request package will be forwarded to the Chief Counsel for a final decision. If the Chief Counsel finds the trial attorney does not meet the qualification criteria, the trial attorney will be notified of the Chief Counsel's decision and the reasons for the decision.

(5). The Chief Trial Attorney will maintain a list of trial attorneys designated as qualified for Type III cases.

7. Exceptions. There is no grandfathering provision. However, the Chief Counsel reserves the right to make exceptions to the qualification requirements on a case-by-case basis. Applications

⁶If the trial attorney seeking Type III qualification is a District Counsel, the request for qualification designation will be submitted to the Division Counsel. If the trial attorney seeking Type III qualification is a Division Counsel, Center Counsel, Laboratory Counsel, or FOA Counsel, the request for qualification designation will be submitted to the Chief Trial Attorney.

for exceptions will be sent through command channels to the Chief Trial Attorney.

8. Management Function. The TAQ Program establishes minimum requirements which trial attorneys must meet in order to represent the Corps as lead counsel in Type II and Type III cases. The assignment of trial attorneys to an individual case is a management function of the head of the legal office.⁷ The fact that a trial attorney has been designated as qualified does not create a right in the trial attorney to be assigned to any particular case.

9. Attorneys. Heads of legal offices should consider the TAQ Program's requirements when employing new attorneys. If contract trial work is a major duty in a new attorney's job description, the attorney should meet the qualification criteria.

10. Revocation. The Chief Counsel, through the Chief Trial Attorney, reserves the right to revoke a trial attorney's qualification designation. The Chief Trial Attorney will notify the trial attorney through command channels that the trial attorney's qualification is being considered for revocation and the reasons for it. The trial attorney will be afforded an opportunity to respond in writing to the notification prior to a final decision. The response will be sent through command channels for comment.

11. Privacy Act Statement. Authority: 10 U.S.C. § 3013 and 41 U.S.C. § 601(1). Purpose and Use: The purpose of the TAQ Program is to ensure that only qualified trial attorneys represent the Corps of Engineers as lead counsel in Type II and Type III contract appeals before the ASBCA and the Engineer Board. The information collected will be used to determine whether trial attorneys seeking designation as qualified for Type II and Type III cases meet the qualification criteria. Disclosure: Furnishing information for this program is voluntary. However, trial attorneys who do not provide the information may not be designated as qualified for Type II and Type III cases.

Encl
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LESTER EDELMAN
Chief Counsel

⁷However, the Chief Counsel, through the Chief Trial Attorney, reserves the right to disapprove the assignment of a particular trial attorney to any appeal, and to remove a trial attorney once assigned.

**TRIAL ATTORNEY QUALIFICATION PROGRAM
SAMPLE MEMORANDUM - REQUEST FOR DESIGNATION -
TYPE II TRIAL ATTORNEY**

(Office Symbol)

(Date)

MEMORANDUM FOR (Head of Legal Office)

SUBJECT: Trial Attorney Qualification Program - Request for Designation as a Qualified Type II Trial Attorney

1. Pursuant to the Chief Counsel Memorandum, subject: Policies and Procedures Concerning the Corps of Engineers' Trial Attorney Qualification Program, I request designation as a qualified Type II trial attorney. I believe that I meet the experience and training qualification criteria, as outlined below.

2. The Program requires that the trial attorney must satisfy one of the following experience requirements:

- (a). Lead counsel in two Type I Board of Contract Appeals (BCA) appeals (including bid protests before the General Services Board of Contract Appeals), or as co-counsel or second chair in one Type II or Type III BCA appeal; OR
- (b). Lead counsel, co-counsel, or second chair in five BCA appeals or non-BCA trials; OR
- (c). Two years of substantial experience in the administration of Federal contracts, such as reviewing Contract Disputes Act claims and preparing Contracting Officer's Final Decisions, plus some experience in preparing cases for trial or litigating cases before Federal, state, or military courts or administrative tribunals.

3. I meet the requirements of paragraph ____ . My trial experience includes the following cases:

Case Name:

Type I, II, or III:

Forum:

Role (Lead, Co-counsel, etc.):

Hearing, Trial or Third Party Assisted ADR?

Enclosure 1

(Alternatively) My contract law experience is as follows:

4. The Program also requires that the attorney must have taken at least one of the following courses, and must agree to apply for the others within two years. If the attorney took an equivalent course to those listed, the name of the course, the sponsor/vendor, and the number of hours of training must also be provided.

The PROSPECT Corps Trial Attorney Course or an equivalent;

The PROSPECT Contract Law Course, JAG School Contract Attorney's Course, or an equivalent;

ADR Training.

I have taken the following course(s):

Course

Date Taken

(If applicable) I agree to apply for the courses necessary to complete the training requirements within two years.

(Signature)

**TRIAL ATTORNEY QUALIFICATION PROGRAM
SAMPLE MEMORANDUM - DESIGNATION -
TYPE II TRIAL ATTORNEY**

(Office Symbol)

(Date)

MEMORANDUM FOR RECORD

SUBJECT: Trial Attorney Qualification Program - Designation of Type II Trial Attorney

1. I have reviewed the attached request of _____ for designation as a qualified Type II Trial Attorney. I find that _____ meets the qualification criteria for a Type II Trial Attorney, as set forth in the Chief Counsel Memorandum, subject: Policies and Procedures Concerning the Corps of Engineers' Trial Attorney Qualification Program.

2. I designate _____ as a qualified Type II Trial Attorney for practice before the Armed Services Board of Contract Appeals and the Engineer Board of Contract Appeals.

Encl

(Signature)

(Date)

Enclosure 2

**TRIAL ATTORNEY QUALIFICATION PROGRAM
SAMPLE MEMORANDUM -TRANSMITTAL OF DESIGNATION -
TYPE II TRIAL ATTORNEY**

(Office Symbol)

MEMORANDUM FOR CDR, USACE, ATTN: CECC-F (MR. FRANK CARR), SO
MASSACHUSETTS AVENUE, N.W., WASHINGTON, D.C.
20314-1000

SUBJECT: Trial Attorney Qualification Program - Designation of Type II Trial Attorney

1. I have designated _____, an attorney in my office, as a qualified Type II Trial Attorney for practice before the Armed Services Board of Contract Appeals and the Engineer Board of Contract Appeals. The documentation I used in making this designation is enclosed.

2. Please add _____ to your list of qualified Type II Trial Attorneys.

3. (If applicable) I am committed to sending _____ to (list training required) within two years.

FOR THE COMMANDER:

Encl

(Signature)
(Title)

Enclosure 3

**TRIAL ATTORNEY QUALIFICATION PROGRAM
SAMPLE MEMORANDUM -REQUEST FOR DESIGNATION -
TYPE III TRIAL ATTORNEY**

(Office Symbol)

(Date)

MEMORANDUM FOR (Head of Legal Office)

SUBJECT: Trial Attorney Qualification Program - Request for Designation as a Qualified Type III Trial Attorney

1. Pursuant to the Chief Counsel Memorandum, subject: Policies and Procedures Concerning the Corps of Engineers' Trial Attorney Qualification Program, I request designation as a qualified Type III trial attorney. I believe that I meet the experience, training, and special skills qualification criteria, as outlined below.

2. The Program requires that the trial attorney must satisfy one of the following experience requirements:

- (a). Lead counsel in any combination of five cases:
BCA appeals, third-party assisted ADRs based on a CDA claim, or cases before the Court of Federal Claims involving CDA litigation; OR
- (b). Lead counsel in one BCA appeal and lead counsel or co-counsel in nine other trials or third-party assisted ADRs; OR
- (c). Co-counsel in two Type III BCA appeals, where the attorney had significant responsibilities in the trials, and lead counsel or co-counsel in nine other trials or third-party assisted ADRs.

3. I meet the requirements of paragraph ____ . My trial experience includes the following cases:

Case Name:

Type I, II, or III:

Forum:

Role (Lead, Co-counsel, etc.):

Hearing, Trial or Third Party Assisted ADR?

Enclosure 4

4. The Program also requires that the attorney must have taken the following courses. If the attorney took an equivalent course to those listed, the name of the course, the sponsor/vendor, and the number of hours of training must also be provided.

- (a). The PROSPECT Corps Trial Attorney Course or an equivalent;
- (b). The PROSPECT Contract Law Course, JAG School Contract Attorney's Course, or an equivalent; AND
- (c). ADR Training.

I have taken the following courses:

Course

Date Taken

5. Finally, the Program requires that the attorney must demonstrate excellent written and oral communication skills, current knowledge of contract law and issues, and the ability to manage extremely complex litigation. I believe that I meet this qualification criteria as follows:

6. Please forward my request for designation as a qualified Type III trial attorney to the Chief Trial Attorney.

(Signature)

**TRIAL ATTORNEY QUALIFICATION PROGRAM
SAMPLE MEMORANDUM -TRANSMITTAL OF REQUEST FOR
DESIGNATION - TYPE III TRIAL ATTORNEY**

(Office Symbol)

MEMORANDUM FOR CDR, USACE, ATTN: CECC-F (MR. FRANK CARR), SO
MASSACHUSETTS AVENUE, N.W., WASHINGTON, D.C.
20314-1000

SUBJECT: Trial Attorney Qualification Program - Request for Designation of Type III Trial Attorney

1. Enclosed is the request of _____, an attorney in my office, for designation as a qualified Type III Trial Attorney for practice before the Armed Services Board of Contract Appeals and the Engineer Board of Contract Appeals.
2. My assessment of _____'s experience, training, and special skills is as follows: (include assessment).
3. I recommend (state recommendation as to whether attorney should be designated as qualified).

FOR THE COMMANDER:

Encl

(Signature)
(Title)

Enclosure 5